1980

Penelko, Inc., A Utah Corporation v. Price Rentals, Inc., A Utah Corporation And John Price Associates, Inc., A Utah Corporation. John Price, C. F. Malstrom, First Doe To Tenth Doe, Inclusive : Respondent's Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

- -

PENELKO, INC., a Utah
Corporation,

Plaintiff and Respondent,

vs.

PRICE RENTALS, INC., a
Utah Corporation,

Defendant and Appellant, No. 16588

and

JOHN PRICE ASSOCIATES, INC.,
a Utah Corporation, et al.,

Defendants.

RESPONDENT'S BRIEF

APPEAL FROM JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT OF SALT LAKE COUNTY
HONORABLE BRYANT H. CROFT

- -

WILLIAM H. HENDERSON
431 South Third East, Suite 208
Salt Lake City, Utah 84111
Telephone: 322-1615

MARK S. MINER
Newhouse Building, Suite 525
Salt Lake City, Utah 84101
Telephone: 363-1449

Attorneys for Respondent

MERLIN R. LYBBERT
REX R. MADSEN
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Appellant,
Price Rentals, Inc.
700 Continental Bank Building
Salt Lake City, Utah 84101
Telephone: 521-9000

IN THE SUPREME COURT OF THE STATE OF UTAH

- -

PENELKO, INC., a Utah
Corporation,

Plaintiff and Respondent,

vs.

PRICE RENTALS, INC., a
Utah Corporation,

Defendant and Appellant, No. 16588

and

JOHN PRICE ASSOCIATES, INC.,
a Utah Corporation, et al.,

Defendants.

RESPONDENT'S BRIEF

APPEAL FROM JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT OF SALT LAKE COUNTY
HONORABLE BRYANT H. CROFT

- -

WILLIAM H. HENDERSON
431 South Third East, Suite 208
Salt Lake City, Utah 84111
Telephone: 322-1615

MARK S. MINER
Newhouse Building, Suite 525
Salt Lake City, Utah 84101
Telephone: 363-1449

Attorneys for Respondent

MERLIN R. LYBBERT
REX R. MADSEN
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Appellant,
Price Rentals, Inc.
700 Continental Bank Building
Salt Lake City, Utah 84101
Telephone: 521-9000

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

RULES CITED

NATURE OF THE CASE

Action for damages, injunctive relief, and attorney's fees for alleged violation of respondent's lease.

DISPOSITION BY THE LOWER COURT

The jury rendered a verdict in favor of respondent and against appellant for damages in the amount of $65,000. After the verdict and judgment thereon, the trial judge, Honorable Bryant H. Croft, denied respondent's motions for injunctive relief and for attorney's fees. Denials of these motions by the lower court are the subject of appellant's appeal, No. 16601.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of said judgment of $65,000 in favor of respondent, or reversed for new trial should the court hold the evidence insufficient.

In respondent's own appeal, No. 16601, presented by separate brief, Penelko, Inc. seeks the reversal of the lower court's orders denying appellant injunctive relief and attorney's fees.

MATERIAL FACTS OF THE CASE

Respondent controverts appellant's statement of facts for the reason that appellant's purported facts are so replete with misstatements and omissions that they give an erroneous picture of the facts in this case. Appellant also fails to recognize that as the facts were found by the jury in favor of respondent, respondent's evidence must be accepted and all inferences from the evidence drawn in favor of respondent. Consequently, respondent, pursuant to Rule 75(p), Subdivision (2), states the facts as it finds them.

Respondent, Penelko, Inc. is a corporation. One-third of its stock is owned by E. Glen Koplin (Director and President), and Carley P. Koplin (Director). Another third is owned by Roger Peterson (Director and Vice-President), and his wife, LaVon Peterson (Director). The remaining third is owned by Doyle Nelson (Director and Secretary-Treasurer), and his wife Charlene Nelson (Director). (1708)

1. The Lease Sued Upon

On March 25, 1972, the respondent and C. F. Malstrom and Alvin E. Malstrom (the Malstroms were defendants below) entered into a lease agreement, which is the subject of the Complaint; a copy of the lease agreement is attached as Exhibit "A" to the Complaint and another copy was

introduced in evidence as Exh. 1-P. The lease term was for twenty years. Pagagraph 15 provides for successive renewals of five (5) years each, making a total term of forty (40) years.

The lease covers a piece of land 120 feet deep and 70 feet wide, which fronts on 9400 South and on 700 East.

Paragraph 3 of the lease also allots respondent parking space, namely a strip of land 70 feet in width and 234 feet in depth, running from the south side of the east parcel proper to the north side of 9400 South Street. This parking strip fronts on 9400 South and adjoins the Perkins' Cake & Steak Restaurant on the east. It is the leased parking space upon which appellant landscaped, built a roadway and erected a flagpole in defiance of Penelko's lease. The exhibits show this leased parking space and "improvements" of appellant in part. (12-P, 14-P, 15-P, 19-P)

Paragraph 3 of respondent's lease also provides an additional tract for parking "40 feet in width and 162 feet in depth" on the west side of the leased property proper.

Paragraph 9 of the lease provides that the lessor shall exert his best efforts to form an association of lessees for the purpose of promoting the general welfare of lessees within the shopping center. Respondent exerted

its best efforts, but no association of lessees was ever formed. (1766, 1737 - 1738)

Paragraph 6 of the lease provides respondent may maintain signs and particularly "one lighted sign" in front of the leased premises (9400 South) but no nearer to 9400 South than Albertson's sign. Paragraph 6 also provides that upon formation of a merchant's association, signs should be replaced and erected "in conformance with rules and regulations of such association". As mentioned above, no association was ever formed.

Paragraph 7 of respondent's lease contains restrictions on the lessors (Malstroms) in leases of property adjoining respondent's leased property.

Respondent regards paragraph 7 of the lease most relevant to this cause, it is set out in full below:

> All parking facilities, lighting facilities and open spaces upon the leased premises are to be used in common with other occupants of property of the lessor for the maintenance and development of a shopping center and no barriers shall be constructed or permitted which will bar access to such parking facilities and access roads by tenants of other premises or their customers or guests. The lessor shall provide in leases of adjoining property similar covenants and agreements so that the lessee shall have similar unobstructed access to parking, lighting and other common facilities of adjoining tenants. (our emphasis)

2. Respondent's Construction of the Chantel Theatre, Erection of Theater Sign, Installation of Parking Lights

From 1972 (execution of respondent's lease) to 1973 respondent constructed the Chantel Theatre on the leased

premises. Substantially and physically, the owners of the corporation constructed the theater. Glen Koplin, President of respondent, is a mason contractor; Roger Peterson, Vice-President of respondent, is a drywall contractor and plasterer; Doyle Nelson, Secretary-Treasurer of respondent, is an electronics worker. (1708)

In 1973, following construction of the Chantel Theatre, respondent established entrance, parking, lighting, and erected the theater sign. The theater sign, is appropriately called a marquee, in that it has lights showing the attraction at the theater each day. The sign was approximately 8 feet by 12 feet on a pole 10 feet above the ground. It had letters on both sides of it, and was placed in an east-west direction so that it could be seen from the traffic flow, both east and west. (1708 - 1714)

In 1973 approval of the theater construction, sign placement and the lights was made by the Malstroms (lessors), by Sandy City, and by Albertson's. Upon these approvals, the Chantel Theatre opened for business in June, 1973. (1715 - 1716)

3. Appellant's Threat That There Were Ways of Acquiring a Business Other Than Buying it

In or about January, 1975, Penelko's officers, E. Glen Koplin, Carley Koplin, and Doyle Nelson had a meeting with John Price. At this meeting, Price told respondent's officers that the Malstroms had now leased the property to Price and there was no place for the theater and it would

have to be purchased by Price or relocated. It didn't look like it could be relocated at all on that property. Price made an unacceptable offer and he told the respondent's officers that there are other ways to get a business if we want to. "We can build around you", "box you in", "so that people can't see that you are there". (1738 - 1740, 1943 - 1944, 2030 - 2317)

Thereafter there was litigation by Malstroms to attempt to evict respondent which ended in execution of an addendum to the lease sued upon, dated July 1, 1977, mentioned below. Pagagraph 4 of the addendum provides that both Malstroms as lessors are in full compliance with all provisions of the lease sued upon.

4. Leases and Contracts Subsequent to Opening of Chantel Theatre

After respondent opened its Chantel Theatre in June, 1973, the parties entered into the following leases and contracts.

a. On March 25, 1975, Malstroms and Price Rentals, Inc. entered into an "Offer to Lease", dated March 27, 1975, which covered the property on which the Perkins' Cake & Steak Restaurant was located. The Offer was personally guaranteed by John Price. (Exh. 8-P, 1789, 1890)

b. On April 4, 1977, Price Rentals, Inc. entered into a contract with Jack L. Kerbs, Inc. for construction of the Perkins' Cake & Steak Restaurant. (Exh. 11-P)

c. On December 20, 1976, Price Rentals, Inc. leased to Perkins' Cake & Steak Restaurant the property on which the restaurant was located. Price Rentals, Inc. agreed to construct the restaurant and also agreed that it would be built in accordance with plans and specifications provided by Perkins' Cake & Steak Restaurant. (Exh. 10-P, 1791 - 1792)

d. On July 1, 1977, respondent and the Malstroms executed the addendum to the lease sued upon as above-mentioned. (Exhibit B to Complaint)

e. On December 1, 1977, Malstroms leased to Price Rentals, Inc. the property on which respondent's theater was located and also the property upon which the Perkins' Cake & Steak Restaurant was constructed. The agreement provided that Price Rentals, Inc. took the property subject to respondent's lease and in effect, sold Malstroms' lease rights to Price Rentals, Inc. (Exh. 7-P, 1789 - 1790) John Price guaranteed the performance of Price Rentals, Inc. on the lease.

5. Appellant's Violation of Respondent's Lease Over Respondent's Protest and After Notice by Respondent of its Lease Rights

By reason of Malstrom's lease to appellant of the property covering respondent's leased property of December 1, 1976, (which was subject to respondent's lease and was in effect a sale of same to Price Rentals, Inc.) (Exh. 7-P)

Price Rentals, Inc. became subject to all of the obligations of the lease sued upon by respondent, and it is so stated in Exhibit 7-P. Thereafter, appellant did the following acts in willful violation of respondent's lease. (Exhibit 1-P)

In the middle of summer of 1977, respondent's president, E. Glen Koplin, noticed some markings placed on asphalt that the Chantel Theatre used in its parking. He asked the man in charge, Marvin Dobkins (Price Rentals, Inc. employee) why he had marked Penelko's parking. Dobkins responded that he represented the Price industries that were leasing the theater to Penelko. Dobkins showed Koplin a plan that left the Chantel Theatre with just a fraction of its parking and was also advised that there was going to be a driveway over the parking and there wasn't going to be a theater sign there, that Price owned the property and was going to redesign it. Koplin responded that Penelko, Inc. had a lease on the property "and you can't do that". Koplin also mentioned that the theater's two lights didn't seem to be on the plans, and Dobkin advised they will be removed also, but he would check into it.

In August, 1977, respondent's Director, Carley Koplin, and her attorney, Nolan Olsen, met with Jack Kerbs, Price Rentals, Inc. contractor for construction of the Perkins'

Cake and Steak Restaurant. Kerbs was advised that construction of the restaurant was infringing on respondent's parking rights as lessee of the property. (1950 - 1951)

In the latter part of August, 1977, appellant cut off the electricity to the theater sign so that the lights did not show and also two of the three parking lights respondent had installed. For two months the theater was in total darkness. (2449 - 2450, 1968 - 1969)

The Perkins' Cake and Steak Restaurant was completed in or about the first of November, 1977. After the restaurant proper was constructed, appellant Price Rentals, Inc. did the following additional wrongful acts in violation of respondent's lease.

Jack Kerbs, Inc., employed by Price Rentals, Inc. to construct the restaurant (Exh. 11-P) ran a 35 foot roadway through the parking lot and re-striped the parking showing no parking permitted on the west side of the restaurant.

Kerbs also build an island, landscaped, erected a flagpole over the parking space and removed two of Penelko's parking lights. Price Rentals, Inc. also tore down Penelko, Inc.'s Chantel Theatre marquee on November 4, 1977. This was ordered by Marvin Dobkins, Price Rentals, Inc. employee who was directed by Price Rentals, Inc. Vice President, Rex Frazier. (1728 - 1733, 1801 - 1823, 2135 - 2145, Exh. 3-P)

The Chantel Theatre marquee was torn down in the presence of and over the verbal protests of respondent's Directors, Carley Koplin and LaVona Peterson. (1953 - 1959,

Exhs. 45-P, 46-P, 47-P)

Construction of the restaurant complete with landscaping, tearing down Penelko's sign, and erection of the restaurant sign, was completed on or about November 4, 1977, and the restaurant opened for business November 7, 1977. (144)

The construction of the Perkins' Cake and Steak Restaurant proper was also a willful violation of Penelko's lease.

The Perkins' Cake and Steak Restaurant adjoined the Penelko leased premises on the south. Respondent's lease, paragraph 7, provided that

> all parking facilities . . . upon the leased premises are to be used in common with other occupants of property of the lessors,

and that

> The lessor shall provide in leases of adjoining property similar covenants and agreements so that the lessee shall have similar, unobstructed access to parking, lighting and other common facilities of adjoining tenants. (our emphasis)

Neither Malstrom's Offer to Lease (Exh 8-P), Lease Agreement between Malstroms and Price Rentals, Inc. (Exh. 7-P) or Price Rentals, Inc. Lease to Perkins' Cake & Steak Restaurant (Exh. 10-P) had any such or similar covenant. Price Rentals' lease to the restaurant provided "that the shopping center shall contain a minimum of 400 parking spaces, . . " (paragraph 24, Exh. 10-P)

But the use of parking spaces of the shopping center was contingent upon the formation of a merchants' association

and the promulgations of rules based on agreements provided for use of such common parking. No merchants' association was ever formed.

The court will have noticed that Price Rentals, Inc.'s lease with Perkins' Cake and Steak Restaurant providing for construction of the restaurant was dated December 20, 1976, which was about a year earlier than Malstroms lease to Price Rentals, Inc. of the property on which the restaurant was located (December 1, 1977). (Exh. 10-P, 7-P) The only contract Price Rentals, Inc. produced providing any right of appellant to construct the restaurant was the "Offer to Lease". It can be inferred that appellant in the action did not produce all writings it was requested to produce, for as is mentioned above, John Price, President of Price Rentals, Inc. was claiming ownership of Penelko lease as early as January, 1975. Even the "Offer to Lease" was dated March 25, 1977.

Further, appellant so constructed the Perkins' Cake and Steak Restaurant that it did not and could not provide parking for Chantel Theatre customers.

Perkins' Cake and Steak property on which the restaurant was built was approximately 73 feet by 155 feet. The restaurant itself substantially covered such property so that the only parking provided was 4 to 5 to 7 spaces at the rear (north) of the restaurant for restaurant employees. (1730, 1987, 2168, Exh. 69-P, 2038 - 2039) Appellant provided no document showing their rights to any other parking spaces,

although subpoenaed to do so. (2212) Sandy City, in its CUP permit, required that the restaurant construct 24 parking spaces, but it did not do so. (Exhs. 22-P, 24-P, 2167)

6. Mitigation of Damages.

Appellant, after tearing down the Chantel Theatre marquee in an attempt to mitigate damages, installed a portable roll-about sign. This was totally useless. The children changed letters around, knocked it to the ground, and people could not see it when they were driving by the theater. (1985 - 1987) Regarding this sign, appellant's expert witness, David C. Edwards, testified "I said I wouldn't have it in front of my business. I wouldn't take the time to put it out there." (2438)

He also testified, "I would say that the portable sign would deteriorate the theater." (2439)

Later, Al Jackson, a representative of appellant, proposed a sign on the Chantel Theatre. He showed director Carley Koplin a proposed drawing of the proposed sign. The proposed sign would not have had much benefit becuase it was too far from the road. Respondent's director, Carley Koplin did approve appellant putting up the sign, but so that there was no question that it did not take the place of the sign that was torn down, wrote on the approval:

> Penelko, Inc. will accept this sign as an effort of sorts to mitigate damages to the corporation. It does not meet Penelko's specifications and not to be accepted as a sole marquee.

Appellants did not install the proposed sign on the top of the theater. (Exh. 55-P, 1970 - 1974)

Penelko has never refused any request of Price Rentals, Inc. to install any sign in an attempt to mitigate damages. (1974)

At about the time that Price Rentals, Inc. tore down the Chantel Theatre marquee, respondent's directors, Carley Koplin and LaVona Peterson asked Edward P. James, Planning Director for Sandy City whether they could replace the Chantel Theatre sign at another location. He replied there was "no way" they could have another sign and further that they (Sandy City) deal only with the owners of the property, and in this case, it was the Malstroms. (1964, 2181 - 2184, 1874 - 1878, 1869 - 1870, 1976 - 1882)

7. Respondent's Damages.

Before the construction of the Perkins' Cake and Steak Restaurant and the landscaping and roadway over respondent's leased parking spaces, respondent had at lease 50 parking spaces. Chantel Theatre patrons had no parking problems. (2170 - 2171) After the construction, there were some 24 spaces left. (1725, 1966 - 1968)

After Perkins' Cake and Steak restaurant opened for business on November 7, 1977, (when appellant had torn down respondent's sign and disconnected two of its parking lights, landscaped and built road) respondent's customers had little or no parking space. Perkins' Cake and Steak Restaurant, having build no parking space of its own and constructed its entrance adjacent to respondent's leased parking space, the restaurant's patrons took over respondent's leased parking

place. Employees of respondent would park off the space in the dirt to at least leave some place for patrons to park. (2170 - 2171) There was little or no parking available. Some days all of it was gone. Some days 10 or more spaces would be left. On the road it would always look like the parking was completely taken. (1736) The Chantel Theatre's evening show commenced at 7:00 p.m. and the restaurant was open 24 hours a day. During the evening shows, the parking was completely taken over. (1735, 1966 - 1968)

Appellant's theater witness David K. Edwards (who visited the theater on the last Saturday in April, 1979) testified that he wouldn't have known there was a theater there if he hadn't made a survey to find it, that he wouldn't go into the theater if he was a customer because it didn't look like a theater. (2445 - 2446)

Before appellant's willful breach of respondent's lease (as above mentioned) the revenue and net income of the Chantel Theatre climbed steadily. After said violations of the lease, consummating in the opening of the Perkins' Cake and Steak Restaurant November 7, 1977, the revenue and net income plunged.

The testimony of respondent's C. P. A. John Gidney, together with his exhibits show this.

Based on Exh. 40-P and 41-P (documents showing all revenues and all expenses of the Chantel Theatre and including income tax returns) Exh. 39-P, 42-P were received in evidence. Pages 1, 2, and 3 of respondent's Exh. 39-P show a steady

climb in revenue from the theater's operation in June, 1973 and the plunge in revenue after appellant's violation of respondent's lease. For example, that year's six-month revenue for the year 1973 was $27,463.90, and for the year 1976 was $68,099.93. (pages 1 and 2, Exh. 39-P)

After appellant's violation of respondent's lease in November, 1977, the revenue for 1978 plunged to $27,776.10. (See page 2 of Exh. 39-P) The graph on page 3 of Exh. 39-P graphically shows this rise and plunge of revenue.

Page 4 of Exh. 39-P shows the rise and fall of net income for the years 1974 through 1978 which are 4 years of operation. This page of the exhibit shows a continual increase of net income of the theater from 1974 through 1976. Then after Price Rentals' violation of Penelko's lease, it shows a sharp decline in net income for 1977 through 1978.

Exh. 39-P originally contained a page 5 (which was made Exh. 43-P). This page contained a mathematical projection of what the income would have been had the Chantel Theatre's growth in profits continued on the lease which reflected a loss of net income for the remaining 35 years of the lease of some $777,000. However, the jury had the facts and figures on this mathematical projection and consequently they could draw inferences. Thus, the jury could have brought in a verdict of damages of some ten times the $65,000 verdict they did bring in. (1904 - 1910)

Exh. 42-P prepared by witness Gidney depicts by graph basically the information contained in Exh. 39-P and graphically depicts the steady rise in income until the appellant's violation of respondent's lease when the revenue plunged. (See Gidney's testimony commencing on 1885)

Gidney further testified that his exhibits showing what the net income could have been had it not been for the sudden plunge in net income after appellant's violation of the lease was substantially consistent with respondent's copies of the United States tax return for the years 1973 through 1977. (Exh. 44-P) Gidney testified that his exhibits correctly reflected the tax returns, when he eliminated income tax factors which did not reflect the actual net income from the operation of the theater. For example, the depreciation of improvements on real property is fixed by cost and is not actual market value. (1938, 1934 and 2024)

Appellant's witness Duane Liddell, a C.P.A. and his exhibits collaberated Gidney's evidence in every respect. It showed, as did Gidney's evidence, that before appellant violated respondent's lease, there was a continual rise in revenue which dramatically decreased after the violations. (2423 - 2424, Exh. 94-D)

ARGUMENT

I. Answering Appellant's Point I That the Judgment Against Appellant Should be Reversed Because of the Trial Court's Error in Denying Appellant's Motions for a Directed Verdict.

Under this heading (pages 14 to 16) appellant attacks the sufficiency of the evidence to sustain the jury's verdict

Actually, the jury's verdict was woefully inadequate. The evidence would have supported a verdict of over $700,000.

The factual basis for the jury's verdict is set forth above in MATERIAL FACTS OF THE CASE and, particularly, Subsection 7 of same "Respondent's Damages". (page 13 supra)

Respecting the sufficiency of the evidence to support the $65,000 verdict are the following facts.

Respondent's theater was not a new venture when appellant willfully and wrongfully violated respondent's lease in 1977. The theater had been operating since 1973. Consequently, it had prior experience upon which to base a claim for loss of future profits it would have made but for appellant's tortious acts; namely, constructing improvements over respondent's leased parking place, tearing down respondent's theater marquee, disconnecting two of respondent's parking lights, and usurping respondent's parking by constructing the Perkins' Cake and Steak Restaurant without any parking for its customers so that it took over respondent's allotted parking after November 7, 1977 when the restaurant opened for business.

These tortious breaches of respondent's lease were calculated, deliberate, and were done with full knowledge of respondent's lease.

Appellant's acts resulted in the decline of respondent's profits and created the uncertainty of what future profits respondent would have made had it not been for these acts in breach of respondent's lease.

The evidence shows that before appellant's breach of respondent's lease, respondent's net income from the theater

climbed steadily. That after said violations consummating in the opening of the Perkins' Cake & Steak Restaurant on November 7, 1977, the revenue income plunged. John Gidney's testimony and his Exhibits 39-P and 42-P show this as stated in "7. Respondent's Damages" above.

As a convenience to the court, we attach hereto as an appendix a copy of Exhibit 39-P.

By mathematical computation and/or inference, had this upward climb of profits contineud until the 35 years remaining of respondent's lease, the loss of profit would have amounted to $777,000. (See Exhibt 32-P, which was originally page 5 of Exh. 39-P. The court did not allow this page in evidence but it was merely a mathematical computation.) Further, as stated above, the evidence of appellant's witness, Duane Lidden, CPA, corroberated Gidney's evidence in every respect.

The authorities appear uniform in holding that (where as here) the party's business is not a new venture but has prior experience upon which to base a claim for future damages, damages for loss of future profits should be awarded despite the fact that they cannot in the nature of them be fixed with exact certainty. And further, that the wrong-doer (appellant herein) cannot complain as his wrongful acts created the uncertainty.

Security Development Co. v. Fedco, Inc., 22 Utah 2d, 462 P2d 706 (1960), involved an action for lost profits for violation of a lease, resulting in loss of floor space. The court pointed out that in Fedco plaintiff was engaged in a

new business venture and had no prior experience upon which to base a claim for loss of future profits. But plaintiff had claimed damages during the period it had occupied the premises, and the court ruled that these damages were not to be denied simply because they could not be ascertained with exactness, stating: "Damages are not to be denied because they cannot be ascertained with exactness."

Regarding the prerogative of the jury to draw inferences from the evidence presented, the court quoted from Lavender v. Kurn, 327 U.S. 645, 653, 66 S.Ct. 740, 744, 90 L.Ed. 916 (1945):

> It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.

In Freeway Park Bldg., Inc. v. Western States Wh. Sup., 22 Utah 2d 266, 451 P2d 778 (1969), where plaintiff was wrongfully evicted from the premises) again the plaintiff had not been in operation long enough to have a history of profit to figure loss of future profits. Nevertheless, regarding defendant's contention that the loss of profits could not be

fixed with exactness and, therefore, there was uncertainty in the evidence, the court stated:

> There is evidence to the effect that the tenants had made a profit during the five months immediately preceding the attachment amounting to approximately $15,000. The records were not complete, and a certified public accountant doing the best he could with what he had calculated the gross sales for the five-month period to be $136,000 and the net profit as stated above. . .
>
> In this case concrete data was given in evidence; and while the records were not sufficient to give the exact prior earnings, we think they were sufficient to enable the jury to infer the amount of damages, if any, which were occasioned by reason of the wrongful attachment and eviction, and thus to give a just verdict in the case. See McCormick on Damages, Hornbook Series, Sec. 229.

Bigelow v. RKO Radio Pictures, Inc., 237 U.S. 251, 90 L.Ed. 652 (1946) states the rule as follows:

> Nevertheless, we held that the jury could return a verdict for the plaintiffs, even though damages could not be measured with the exactness which would otherwise have been possible. In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances "juries are allowed to act on probable and inferential as well as upon direct and positive proof" . . .
>
> It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.
>
> The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.

> The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done, and difficulty in ascertaining the damages is not to be confused with the right of recovery for a proven invasion of the plaintiff's rights.

See also Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 75 L.Ed. 544 (1931), in which it is stated as follows:

> Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show that the extent of the damages is a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise . . . As the supreme court of Michigan has forcefully declared, the risk of the uncertainty should be thrown upon the wrongdoer instead of upon the injured party. Allison v. Chandler, 11 Mich. 542, 550-556.

Eastmen Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 71 L.Ed. 684 (1927), (the classic decision), states the rule as follows:

> "Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis for computation is afforded, although the result be only approximate." This, we think, was a correct statement of the applicable rules of law. Furthermore, a defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible. Hetzel v. Baltimore & O.R. Co., 169 U.S. 26, 39, 42 L.Ed. 648, 562, 18 Sup. Ct. Rep. 255. And see Lincoln v. Orthwein, 57 C.C.A. 540, 120 Fed. 880, 886.

See also Jacksonville Blow Pipe Co. (5th Cir.), 264 F2d 717 (1959); Wyoming Wool Marketing Assoc. v. Woodruff, 372 P2d 174, 3 ALR3d 802 (1962); and Reed v. Williams, (Ark.) 445 S.W. 90 (1969).

II. Answering Appellant's Point II. That the Court Erred in Application of the Law to the Facts of the Present Case.

Respondent believes what it has said above completely answers appellant's Point II. Under this argument on pages 21 through 23, appellant contends that the court failed to properly instruct the jury on proximate cause re damages. Even had this been the case, the error would not have been prejudicial. For the evidence was sufficient to support a finding that appellant's willful and wrongful acts did, without question, cause respondent's lost profits.

As is pointed out above, before appellant's violation of respondent's lease, respondent had no parking problems. But after appellant had landscaped and built a roadway over respondent's parking space and after appellant had torn down the Penelko Theatre sign and disconnected two of its lights, and after the Perkins' Cake & Steak Restaurant was opened on November 7, 1977, there was little or no parking available for Penelko's theater customers. Some days, all of the parking was gone. Appellant's theater witness testified if he hadn't made a survey to find a theater, he wouldn't have found it because it didn't look like a theater, and if he were a customer, he wouldn't go into it. (See page 14 supra)

However, the court did properly instruct the jury re proximate cause and damages. In Instruction No. 21, the court stated:

> If you find the issues in favor of plaintiff and against the defendants, or either of them, it will be your duty to award the plaintiff such damage, if any, as you may find from a preponderance of the evidence will fairly and adequately compensate plaintiff for any injury, and the damages therefor, as defined in these instructions, which plaintiff has sustained as a consequence of any wrongful conduct of defendants, or either of them. (1205)

Further, the jury was instructed,

> Such damages must be certain both in their nature and as to the cause from which they proceed. They must be directly and necessarily occasioned by the lessor's wrongful act and must have been reasonably within the minds of the parties at the time of the lease. (Instruction 22, 1206)

The error in the court's instructions was against Penelko, Inc. For examples:

In instruction No. 15 the court instructed the jury that the plaintiff's rights under the lease to use parking areas, install signs and lights were still subject to the rights of the lessors, first the Malstroms and then Price Rentals, Inc., to develop an integrated shopping center. (1198) But no integrated shopping center was ever authorized under the lease and no merchants' association was ever formed. (see paragraph 6 of respondent's lease)

In instruction No. 20 the court instructed the jury that in determining whether any act done by defendant was wrongful, the jury should consider whether such acts were reasonably intended to further the purpose of developing an integrated shopping center. But as stated above, the very least parking rights plaintiff had under paragraphs 3 and 7 of its lease (whether or not a shopping center had been formed) was to use

the parking in common with the adjoining tenant, Perkins' Cake & Steak. Price Rentals, Inc. by landscaping over the parking place, building a roadway on it, striping it for no parking and erecting a flagpole prevented such use by plaintiff.

Price Rentals contends on pages 21 and 22 of its brief that much of testimony of witness John Brown was permitted to go to the jury permitting it to speculate on the damage to Penelko's leasehold.

Mr. Brown was an independent real estate appraiser with outstanding qualifications. He was familiar with the leased property and theater. He examined it many times, and was an expert in appraising theaters. (2040 - 2042, 2044 - 2049, 2058) Mr. Brown's proposed testimony was to show the value of Penelko's leasehold before Price Rentals' violation of the lease and after the violation of the lease.

The court refused to permit one iota of opinion testimony of Mr. Brown on the value of Penelko's leasehold.

For examples:

The court sustained Price Rentals' objection as to the best use of the property. (2050)

It sustained Price Rentals' objection as to economic rent. (2052, 2053)

The court sustained Price Rentals' objection as to the value of the leasehold interest. (2054)

It sustained Price Rentals' objection as to the present worth of the lease prior to November 4, 1978. (2066)

It sustained Price Rentals' objection as to whether the parking lots were empty the 10 or 12 times Brown visited the premises.

The court sustained Price Rentals' objection of the value of the lease. (2079 - 2082)

The court stated it would not question Brown's qualifications. (2098)

But the court ruled it was not willing to rule that Brown's testimony presents a fair measure of damages and could not see that Brown's testimony consisted of a proper measure of damages. (2099 - 2101)

These errors of the lower court on instructions and refusal to admit expert testimony were prejudicial errors.

But respondent does not seek the reversal for new trial on these errors except should the court rule that the evidence was not sufficient to sustain the jury's verdict of $65,000. Respondent does not want the expense involved in a new trial.

III. Answering Appellant's Point III. That the Court Erred When it Refused to Permit the Introduction of Evidence That was Relevant and Material to Vital Defenses Raised by Appellant.

Appellant's arguments under Point III. appear to be that respondent refused to let appellant erect theater signs that would have mitigated respondent's damages.

That is not correct. For as is pointed out above, respondent permitted appellant to erect any sign it desired. Appellant did install a roll-about sign that was worse than useless. But appellant declined to install a sign on top of the theater when Director Carley Koplin would not agree that it would replace the marquee torn down.

Appellant's statement at page 23 of its brief of the testimony of Bernard Reynolds, Sandy City Planner, that the city would have permitted relocation of plaintiff's sign is misleading to say the least. Reynolds was not Sandy City Planner at the time respondent's marquee was torn down. He did not know the regulations at that time, and his testimony was not unequivocable.

Mr. Reynolds was not employed by Sandy City when the C.U.P. permit was issued providing that Penelko, Inc. must provide 24 parking spaces. He testified that if the property on which Price Rentals landscaped, built a roadway and erected a flagpole were on separate parcels of property, then there could be separate signs. But that leases were not within the ordinances and had no relevance; that the whole area was owned by the Malstroms. Further, that the restaurant sign had no right to be installed where it was unless on a separate parcel. That Price Rentals had no right to install the restaurant sign unless the theater sign came down. (2161, 2162, 2167, 2321, 2322, 2362, 2327)

Penelko's theater marquee was already erected on the parcel, therefore, Price Rentals, Inc. tore it down.

The planning director handling this matter at the time was Edward P. James. And as is pointed out above, respondent's directors, Carley Koplin and LaVona Peterson approached James on putting up another sign, and James replied, "No way", and that he only dealt with the owner of the property, which in this case was the Malstroms. (page 13 supra)

Appellant's proposal to erect a double sign involved an agreement with the Norge Village Cleaners. The cleaners' property was not owned or controlled by Penelko. It was property adjacent to appellant on its west boundary.

Price Rentals' contention on page 24 of its brief that the court rejected evidence of its proposal to erect a double sign with the cleaners is misleading to say the least.

On the morning Price Rentals tore down Penelko's theater marquee, November 3, 1977, Penelko's director, Carley Koplin, had a telephone conversation with Marv Dobkins speaking for Price Rentals. He proposed taking the Chantel Theatre sign down and adding a dual sign with the cleaning company. She advised that she could not consent to it until she had a meeting with the corporation's other directors. She went to the site of the theater with director LaVona Peterson. Price Rentals, Inc. tore down the sign while they were there. (1951 - 1959)

Appellant did not put up such sign, and after Perkins' Cake & Steak opened its business and usurped respondent's parking place it would hardly have mitigated damages. Respondent permitted appellant any sign it wanted, to mitigate damages. But the only sign appellant erected was the useless "roll-about" sign.

On page 30 of its brief, Penelko argues that the court erred in not permitting it to cross-examine director Carley Koplin on the contents of Penelko's intermediate appeal prepared by Penelko's attorney, William H. Henderson. This argument is

obviously without merit. (See Petition in Supreme Court) There is no such admission.

IV. Answering Appellant's Point IV. That Appellant is Entitled to a Reversal of the Judgment Because of the Court's Prejudicial Statements During the Trial.

The trial court was not guilty of misconduct, and appellant's accusation of same is frivolous.

On pages 34 and 35 of appellant's brief, appellant complains because the court, in overruling an objection of appellent's counsel, stated that the lawsuit arises because of the fact that the roadway landscaping was constructed on parking area leased to the Penelko theater. Paragraph 3 and 7 of the lease provides, at the very least, that Penelko have the right to use its leased parking places in common with adjoining lessees. Thus, the very least Penelko had under this lease was the right to use the space in common with Perkins' Cake & Steak Restaurant. Thus, a roadway and landscaping over this leased space prevented its use in common by appellant, and this, among other things, is what this lawsuit was about. It can hardly be misconduct of the trial judge to tell a jury what the lawsuit is about.

The other claim of misconduct of the trial judge was his statement quoted on page 37 of appellant's brief that neither Sandy City, John Price, or Price Rentals had any right to allocate to the restaurant as its parking stalls any parking space on the respondent's leased land and had no right to authorize construction on respondent's leased parking space.

This also was a correct statement of the law. Obviously, John Price, John Doe, Sandy City, or any one else had no right to alter respondent's rights under its lease.

DATED: July 11, 1980

Respectfully submitted,

MARK S. MINER
Newhouse Building, Suite 525
Salt Lake City, Utah 84101
Telephone: 363-1449

WILLIAM H. HENDERSON
431 South Third East, #208
Salt Lake City, Utah 84111
Telephone: 322-1615

Attorneys for Respondent

By: William H. Henderson
William H. Henderson

CERTIFICATE OF SERVICE

I hereby certify that I served two copies of the foregoing Respondent's Brief by mailing the same, postage prepaid, to the office of Snow, Christensen & Martineau, 700 Continental Bank Building, Salt Lake City, Utah, 84101, this 11th day of July, 1980.

William H. Henderson

APPENDIX

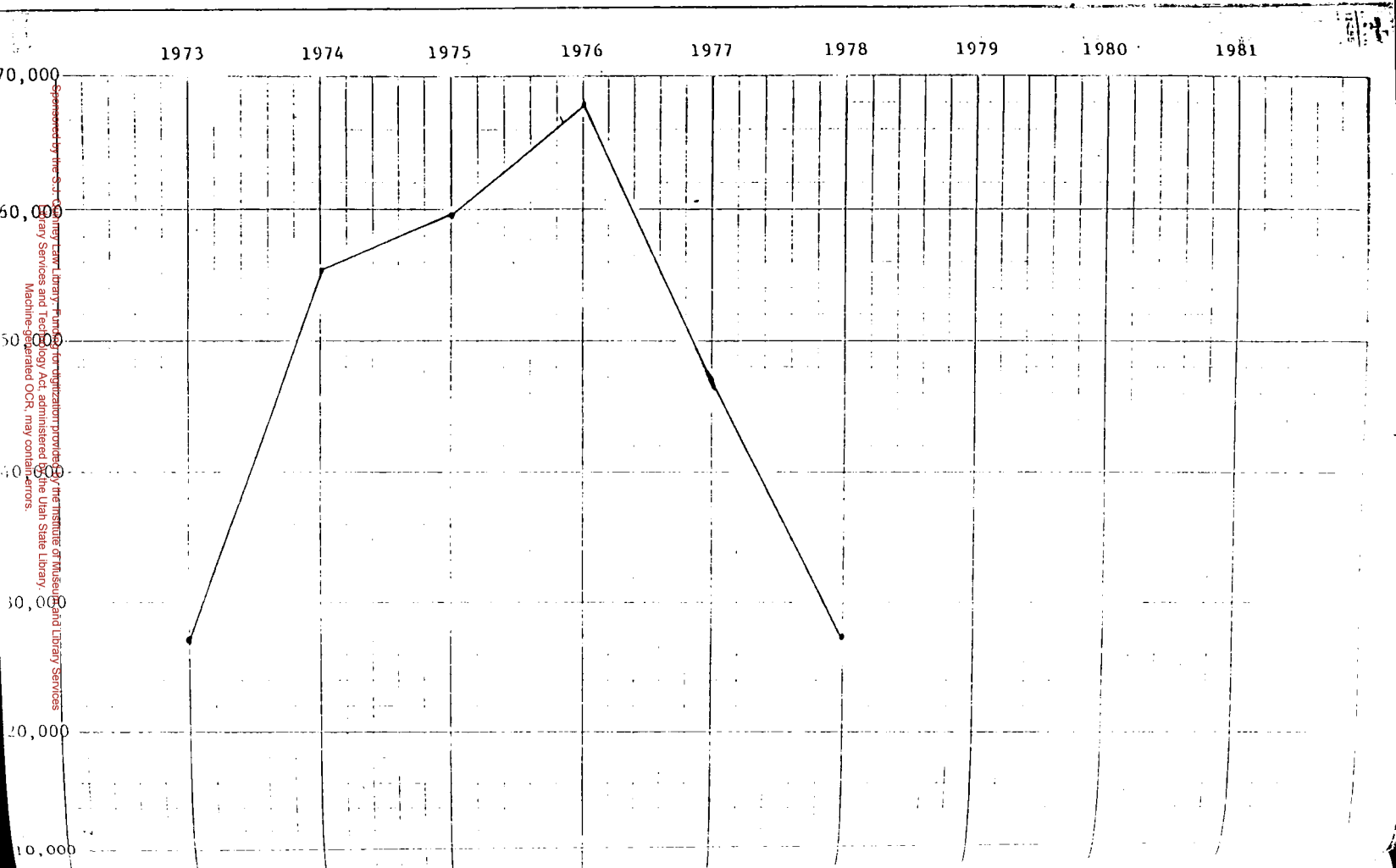
PENELKO, INC.

INDEX

PENELKO, INC.
SUMMARY OF SALES
(CASH BASIS)
JUNE 1973 THROUGH MARCH 1979

Month and Year		Ticket Sales	Concession Sales	
June	1973	$ 1,124.00	$ 401.48	$ 1,[illegible]
July		3,310.25	1,118.23	4,[illegible]
August		3,633.00	1,291.38	4,[illegible]
September		2,402.50	1,001.85	3,[illegible]
October		3,470.00	1,595.66	5,[illegible]
November		3,448.75	1,381.66	4,[illegible]
December		2,330.50	954.64	3,[illegible]
	TOTAL 1973	$ 19,719.00	$ 7,744.90	$ 27,[illegible]
January	1974	$ 3,088.00	$ 1,255.00	$ 4,[illegible]
February		3,516.50	1,151.54	4,[illegible]
March		2,574.00	1,139.70	3,[illegible]
April		2,501.00	1,127.01	3,[illegible]
May		2,771.50	1,055.44	3,[illegible]
June		2,966.50	1,420.36	4,[illegible]
July		3,188.50	1,145.76	4,[illegible]
August		3,421.50	1,491.67	4,[illegible]
September		3,518.00	1,527.37	5,[illegible]
October		5,696.50	2,082.76	7,[illegible]
November		4,622.50	1,613.66	6,[illegible]
December		1,923.50	738.69	2,[illegible]
	TOTAL 1974	$ 39,788.00	$ 15,748.96	$ 55,[illegible]
January	1975	$ 3,006.00	$ 1,359.77	$ 4,[illegible]
February		4,727.50	1,866.85	6,[illegible]
March		2,817.00	1,434.48	4,[illegible]
April		2,733.50	1,312.07	4,[illegible]
May		3,115.50	1,332.25	4,[illegible]
June		3,732.00	1,490.99	5,[illegible]
July		4,103.50	1,434.79	5,[illegible]
August		5,625.00	2,131.13	7,[illegible]
September		3,940.00	1,532.17	5,[illegible]
October		3,837.50	1,590.66	5,[illegible]
November		3,013.50	1,243.48	4,[illegible]
December		1,856.00	681.16	2,[illegible]
	TOTAL 1975	$ 42,507.00	$ 17,409.80	$ 59,[illegible]

Month and Year		Ticket Sales	Concession Sales	Total Sales
January	1976	$ 3,738.00	$ 1,484.48	$ 5,222.48
February		2,730.50	1,205.59	3,936.09
March		5,439.75	2,026.54	7,466.29
April		5,093.25	1,587.50	6,680.75
May		2,299.50	826.24	3,125.74
June		6,124.50	1,941.75	8,066.25
July		6,111.00	1,887.12	7,998.12
August		3,569.00	1,268.66	4,837.66
September		4,322.50	1,462.73	5,785.23
October		4,871.75	1,525.24	6,396.99
November		4,292.00	1,429.54	5,721.54
December		2,110.50	752.29	2,862.79
	TOTAL 1976	$ 50,702.25	$ 17,397.68	$ 68,099.93
January	1977	$ 3,654.00	$ 1,232.77	$ 4,886.77
February		2,253.50	659.61	2,913.11
March		3,537.00	1,129.10	4,666.10
April		2,848.25	1,024.99	3,873.24
May		4,010.00	1,489.77	5,499.77
June		2,961.50	1,068.70	4,030.20
July		2,751.50	1,066.87	3,818.37
August		3,947.00	1,315.40	5,262.40
September		2,655.50	931.87	3,587.37
October		2,869.50	1,219.40	4,088.90
November		2,295.75	777.25	3,073.00
December		846.50	329.85	1,176.35
	TOTAL 1977	$ 34,630.00	$ 12,245.58	$ 46,875.58
January	1978	$ 1,520.00	$ 547.70	$ 2,067.70
February		1,415.50	527.20	1,942.70
March		1,047.00	401.75	1,448.75
April		1,540.00	674.57	2,214.57
May		2,315.00	874.90	3,189.90
June		1,732.00	668.10	2,400.10
July		1,937.00	690.88	2,627.88
August		2,476.00	815.85	3,291.85
September		1,740.50	720.30	2,460.80
October		1,755.50	570.40	2,325.90
November		1,525.50	496.05	2,021.55
December		1,415.50	368.90	1,784.40
	TOTAL 1978	$ 20,419.50	$ 7,356.60	$ 27,776.10
January	1979	$ 4,332.00	$ 1,600.77	$ 5,932.77
February		2,362.50	959.70	3,322.20
March		1,421.50	616.35	2,037.85



PENELKO, INC.
INCOME STATEMENT
(CASH BASIS)
1974 - 1978

	1974	1975	1976	1977	1978
SALES					
Ticket Sales	$ 39,788.00	$ 42,507.00	$ 50,702.25	$ 34,630.00	$ 20,419.
Concession Sales	15,743.96	17,409.80	17,397.68	12,245.58	7,356.
Less Sales Tax	(2,216.91)	(2,978.51)	(2,835.97)	(1,918.46)	(1,800.
TOTAL SALES	$ 53,320.05	$ 56,938.29	$ 65,263.96	$ 44,957.12	$ 25,975.
COST OF SALES					
Film Rental	$ 13,377.36	$ 18,705.96	$ 21,544.42	$ 14,018.33	$ 8,728.
Concessions Costs	9,350.11	10,324.79	8,311.78	6,198.58	4,274.
TOTAL COST OF SALES	$ 22,727.47	$ 29,030.75	$ 29,856.20	$ 20,216.91	$ 13,002.
GROSS INCOME	$ 30,592.58	$ 27,907.54	$ 35,407.76	$ 24,740.21	$ 12,972.
OPERATING EXPENSES					
Advertising	$ 2,421.84	$ 2,671.81	$ 2,981.34	$ 2,350.14	$ 1,508.1
Utilities	1,760.20	2,178.60	2,438.07	2,787.41	2,842.7
Rent	2,780.00	2,160.00	---	5,369.76	2,886.8
Insurance	1,392.33	1,288.32	696.78	1,837.88	1,323.2
Repairs & Maintenance	439.90	755.80	700.55	120.78	---
Office Supplies	30.57	6.95	15.31	17.66	133.1
Legal & Accounting	281.00	675.00	205.00	205.00	185.0
Contributions	10.00	---	---	---	---
Property Taxes	2,216.11	2,253.48	2,537.52	2,581.02	---
Taxes & Licenses	33.81	354.89	397.85	453.85	35.0
TOTAL ORDINARY OPERATING EXPENSES*	$ 11,365.76	$ 12,344.85	$ 9,972.42	$ 15,723.50	$ 8,914.1
CASH AVAILABLE FOR DEBTS**	$ 19,226.82	$ 15,562.69	$ 25,435.34	$ 9,016.71	$ 4,058.7

*Depreciation is not included, as all cash outlay for building and equipment was in 1973.

**All loans are scheduled for 1980 payoff - then available cash would go to stockholders.